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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

No. 23

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

WENTWORTH KIRKLAND,
ROBERT N. GOLDING,
Counsel for Arthur C. Brown.

CHICAGO LAW PRINTING COMPANY, CHICAGO

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STATEMENT.

This case came here on certificate from the Circuit Court of Appeals for the Seventh Circuit and the points raised by the questions certified have already been discussed by counsel.

The entire record has been ordered up by this court (R. 1)[1] and this supplemental brief will be divided into Part I, a reply to the government's brief already filed, and Part II, a brief and argument on additional points raised by the record.

No opinion was filed by either the Circuit Court of Appeals or the District Court.

[1] All references in this supplemental brief are to the record, No. 33, printed for the October Term, 1927.

Part I.

A reply to the government's argument, in support of its contention that an unincorporated association has become an entity by virtue of the Sherman Act.

The government's reasoning seems to be as follows:

1. That, although an unincorporated association was not an entity at common law,

2. Congress has provided, in the Sherman Anti-Trust Law, that certain restraints of trade committed by persons are unlawful, and has provided, in sec. 8,

> "That the word 'person' or 'persons,' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,"

3. Which statutory provision, conferring privileges upon the association as an entity,

4. Makes it necessary to conclude that the association is an entity.

The assumption of the very point in issue makes us conscious of a disturbing circular movement in this argument.

To support the argument, the following points are advanced:—

a. That it has been assumed that unincorporated associations may be proceeded against under the Act.

Lord Denman's reply to a similar argument is so appropriate that we quote it in lieu of presenting the idea in language less clear and concise, to-wit:

> "Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the

same general terms, and they have taken for granted that it might be truly so stated. And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision;' a third column, under the heading of 'Law taken for granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."[2]

b. That the conception of an entity informally created for a single purpose is not new, citing the example of the corporation sole.

This brings out the real point in the case with delightful frankness. What is the "single purpose" which counsel have in mind? It can be nothing else but the entry into precincts forbidden to the investigating authorities by the constitution.

The use of the corporation sole as an example should make even opposing counsel pause to consider whither their reasoning processes are carrying us.

We tender them for debate this assertion,—

That if Congress can, by its *fiat*, create out of a group of individuals engaged in a particular business, a corporation, against their will, then it can create a corporation sole out

[2] *O'Connell* v. *The Queen*, 11 Cl. & F. at p. 372.

of any individual engaged in a particular business, as selling liquor.

We have discovered no reason why Congress, if it can do the one, cannot do the other.

A simple amendment to each of the existing criminal statutes would result in there being no individual in the United States who could not be compelled to produce his books and papers for use against himself in a criminal proceeding, the constitution to the contrary notwithstanding.

In the cases cited by counsel, the documents had been seized on search warrants. Entirely different questions are raised by that method of procedure when the owner fails to take proper steps to have the documents returned.

It is true that in some of the cases, particularly in the *Haywood* case, the opinion contains language which indicates that the court believed that an unincorporated association was an entity. The certificate in the case at bar may, however, have resulted from a doubt created by an attempt to apply to this case some of the language contained in the opinion in the *Haywood* case.

The *Haywood* case differs from the instant case in one detail of controlling importance.

The United States, in that case, had seized the property and the defendants were attempting to secure a return of the papers. The situation was succinctly stated by the Circuit Court of Appeals as follows (298 Fed. at 804):

> "Each defendant moved for the return of property that had never been in his possession and was not taken from his person or home or place of business. When asked by the court to specify what property had been taken from each and how their several privacies had been invaded, they declined."

In the instant case, Brown has the documents, in his possession. If he be forced to deliver them to the grand jury and/or the United States, it is obvious that he will have been obliged to give up actual possession of specific papers, which can be described exactly and in full detail.

Part II.

BRIEF AND ARGUMENT ON ADDITIONAL POINTS.

Brief of Argument.

Brown should not have been held in contempt for the following reasons:

A. The subpoena was too broad and all-inclusive.

Hale v. *Henkel*, 201 U. S. 43;
In re American Sugar Refining Co., 178 Fed. 109;
Rawlins v. *Halls-Epps Clothing Co.* (5 C. C. A.), 217 Fed. 884;
Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117;
Ex parte Gould, 60 Tex. Cr. R. 442, 132 S. W. 364;
American Car & Foundry Co. v. *Alexandria Water Co.*, 221 Pa. 529, 70 Atl. 867;
State v. *Davis*, 117 Mo. 614, 23 S. W. 759.

B. No showing of materiality was made.

Miller v. *Mutual Reserve Fund Life Ass'n.*, 139 Fed. 864;
U. S. v. *Terminal R. Ass'n.*, 154 Fed. 268;
Daniel v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753;
State v. *Wurdeman*, 176 Mo. App. 540, 158 S. W. 436;
Kullman, Salz & Co. v. *Superior Court*, 15 Cal. App. 276, 114 Pac. 589.

ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

A. The orders of the district court compel Brown to produce his own documents, for use against himself in a criminal proceeding, in violation of his constitutional rights.

This was an attempt to obtain evidence for use in the trial of an indictment brought against Brown and others, who had been indicted for alleged violations of the Sherman Anti-Trust law, arising out of their connection with the association. This indictment had already been found, had been returned, and the cause was pending in the district court when the subpoena in this case was issued. (R. 5.)

Brown was first subpoenaed *personally* to bring the documents in question before the grand jury. He complied with the terms of the subpoena, but when he insisted upon being treated as a witness, so that he might gain immunity under the statute,[3] which provides for such cases as this, no one wanted the documents and he was dismissed. (R. 5-6.)

Thereafter, this present subpoena was issued, directed to the partnership, service being made upon Brown. (R. 1.)

It seems too plain for further argument that these documents, being partnership papers, were the property of Brown,[4] who was no more bound to produce his documents than he was to testify to their contents.[5]

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[3] Act of Feb. 25, 1903, Sec. 1, Ch. 755, 32 Stat. L. 903, 4 Fed. Stat. Ann. (2 ed.) 567.

[4] *U. S.* v. *Brasley*, 268 Fed. 59.

[5] *Ballman* v. *Fagin*, 200 U. S. 186;
Internal Revenue Agent v. *Sullivan*, 287 Fed. 138.
Semble, *Thompson* v. *U. S.*, 10 F. (2d) 781.

B. The subpoena was too broad and all-inclusive.

This subpoena demanded the production of

> "All letters or copies of letters, telegrams or copies of telegrams,"

which passed between the association, its predecessor association, their officers and agents and the members thereof,

> "including corporations, partnerships and individuals, and their respective officers and agents." (R. 2.)

The period covered was three years, five and one-half months.

The matter under investigation was "the manufacture and sale of case goods." (R. 2.)

Brown's objections to the breadth of this subpoena were specifically made in his sworn answer to the first presentment. (R. 6.)

In *Hale* v. *Henkel*, 201 U. S. 43, this court held invalid a subpoena which called for the production of all contracts and correspondence between the corporation

> "and no less than six different companies,"

as well as all letters received by the corporation

> "from more than a dozen different companies."

The subpoena in this case required the production of letters and telegrams passing between 192 persons. (R. 6.)

A subpoena, more specific and less comprehensive than this, was held invalid in *In re American Sugar Refining Co.*, 178 Fed. 109.

An equally broad subpoena was held invalid in *Ex parte Gould*, 60 Tex. Cr. R. 442, 132 S. W. 364, wherein the court, quoting from *Ex parte Brown*, 72 Mo. 83, said:

"To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Moreover, the subpoena in this case called for the production of all letters and telegrams

"relating to the manufacture and sale of case goods." (R. 2.)

No warrant exists in law for the issuance of a subpoena which requires the witness, at his peril, to determine what documents come within such a description in a subpoena which called for no specific papers.[6]

In *Ex parte James*, 70 Cal. 638, 12 Pac. 117, the witness had been subpoenaed to produce all telegrams passing between certain designated persons within a given period of time. The witness refused to obey and was sentenced for contempt.

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[6] *Rawlins* v. *Hall-Epps Clothing Co.* (5 C. C. A.), 217 Fed. 884, 887.

In ordering his release on habeas corpus, the court said:

> "He was required to search for and produce all messages from a number of persons, to many other persons between certain specified dates. The service of the subpoena was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received."

C. No showing of materiality was made.

The presentments alleged that

> "the evidence called for in said subpoena is important and material." (R. 4, 8.)

Brown's answer specifically raised the point that

> "said subpoena fails to show that the documents described therein are important or material." (R. 6.)

A bare allegation of materiality and importance, without facts to support it, is insufficient.[7]

In *Miller* v. *Mutual Reserve Fund Life Ass'n.*, 139 Fed. 864, the court refused to punish a witness for contempt for refusing to obey a similar subpoena, saying:

> "It was not expected that any such grotesque subpoena *duces tecum* as we have here would ever be taken out, calling for apparently a cart load of books and papers, nearly all of which, so far as their description indicates, have nothing whatever to do with the issues raised by the pleadings. The motion to punish for failure to obey

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[7] *Daniel* v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753, 762;
Kullman, Salz & Co. v. *Superior Court*, 15 Cal. App. 276, 114 Pac. 589, 593;
State v. *Wurdeman*, 176 Mo. App. 540, 158 S. W. 436, 437.

> this omnibus subpoena is denied. If in this long enumeration there are a few items which possibly might have some bearing on the controversy, complainant may take out new and separate subpoenas for them. The court will then look into the merits of each separate application to produce."

Much of the matter described in the subpoena may have little or no bearing upon any violation of the Sherman Anti-Trust law. It is beyond the bounds of reason to assume that *every* letter and telegram exchanged between 192 persons, during a period of over three years, had to do with violating the law.

The truth of the whole matter is, this subpoena is merely a search for evidence, to be used against Brown, on the trial under the indictment.

> "Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a 'fishing examination,' and is always regarded as oppressive, and as such denied."[8]
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant and irrelevant, in the hope that something will turn up."[9]

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[8] *U. S.* v. *Terminal R. Ass'n.*, 154 Fed. 268, 272.

[9] *Federal Trade Com.* v. *American Tobacco Co.*, 264 U. S. 298, 306.

CONCLUSION.

It is submitted that Brown was correct when he called the attention of the grand jury to the fact that the association was not an entity and could not, therefore, respond to the subpoena.

It is further submitted that Brown was justified in declining to produce his papers or to answer questions until and unless he personally was subpoenaed and sworn as a witness.

It is further submitted that, even though it be held that Brown had to respond to a subpoena addressed to an association, nevertheless Brown was justified in refusing to answer questions, because the subpoena contained no *ad testificadum* clause, and that the present subpoena was so indefinite and sweeping as to constitute an unlawful search and seizure.

The judgment of the trial court should be reversed.

Respectfully submitted,

Weymouth Kirkland,
Robert N. Golding,
Counsel for Arthur C. Brown.